LEMBAGA TABUNG ANGKATAN TENTERA A

v.

PRIME UTILITIES BHD

HIGH COURT MALAYA, KUALA LUMPUR B
HASNAH MOHAMMED HASHIM J
[SUIT NO: 24NCC-364-10-2011]
24 JULY 2012

COMPANY LAW: *Derivative action - Suit against directors - Whether minority shareholder fulfilled requirements for leave to commence derivative action - Companies Act 1965, ss. 181A and 181B - Whether applicant acted in good faith and in best interests of company* C

The plaintiff, ('LTAT') a minority shareholder in the defendant company, ('PUB'), filed the instant originating summons pursuant to ss. 181A, 181B and 181E of the Companies Act 1965, ('the Act') for leave to commence a derivative action on behalf of PUB against its former and current directors to, *inter alia,* hold them accountable for PUB's failure to recover the balance of an investment sum it had placed in a foreign asset management company ('Boston'). Of the RM112m that PUB had placed with Boston, the latter had only returned RM4m and PUB, in its annual financial report, admitted that the balance RM108m was still due and owing. LTAT discovered that PUB had negligently failed to take necessary steps to recover the balance investment sum and that following Boston's winding-up, PUB had also failed to file a proof of debt in the winding-up despite being requested to do so by LTAT. LTAT alleged that PUB's directors failed to give any explanation for their failure to recover the balance investment sum despite LTAT sending them letters requesting for an explanation. D E F G

Held (granting leave in prayer (i) with costs):

(1) The plaintiff had shown through its affidavits that it was acting in good faith and in the best interest of the company in bringing the action. There was no evidence of bad faith or collateral purpose in the making of the application. (para 26) H

(2) The plaintiff's complaints were not without basis or substance. As a minority shareholder, the plaintiff had the right to take a derivative action to protect the interest of the company. The I

A plaintiff had complied with all the procedural requirements as required under ss. 181A and 181B of the Act to obtain leave. (paras 28 & 29)

Case(s) referred to:

B *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA* ***(refd)***

Discovery Enterprises Inc v. Ebco Industries Ltd [1997] BCTC LEXIS 5338 ***(refd)***

Mohd Shuaib Ishak v. Celcom (Malaysia) Bhd [2008] 1 LNS 314 HC ***(refd)***

R v. Secretary of State for the Home Department, ex p Rukshanda Begum

C *[1990] COD 107* ***(refd)***

Re Thien Kon Thai [2008] 6 MLJ 278 ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627

D *SC* ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 181A, 181B(2), 181E

For the plaintiff - Yap Han (Loh Mei Ching with him); M/s Mah-Kamariyah & Philip Koh

E *For the defendant - Rajan Navaratnam; M/s Rajan Navaratnam*

Reported by Ashok Kumar

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JUDGMENT

Hasnah Mohammed Hashim J:

Introduction

G **[1]** Enclosure 1 is the plaintiff's originating summons dated 24 October 2011 bearing an application pursuant to ss. 181A, 181B and 181E of the Companies Act 1965 ('CA') for leave to bring an action on behalf of the defendant company against the former and current directors of the defendant:

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(i) Leave be granted to the plaintiff to commence and/or bring action against the former and current directors of the defendant namely:

I (a) YBhg Dato' Nik Ezar bin Nek Bolia

(b) Ramakrishnan a/l S Navaratnam

(c) Dato' Abdullah bin Mohd Zain

(d) Dato' Mohamed Kamal bin Hussain

(e) Dato' Sri Md Kamal bin Bilal

(f) Jamal Mohamed bin Sma Mohamed Mydin

(g) Dato' Paduka Khairuddin Abu Hassan

(h) Fong Heng Leong

(i) Chan Kim Chee

and/or such other parties liable to the defendant arising from the defendant's investment in the foreign asset management company as disclosed in the defendant's annual report, within 30 days from the date of the order, in the name and benefit of the defendant;

(ii) Leave be granted to the plaintiff to commence, bring and/or maintain action including any interlocutory applications against the aforesaid parties in the name and benefit of the defendant;

(iii) Leave be granted to the plaintiff to oppose, in the name and for the benefit of the defendant, any appeal and/or any interlocutory application filed and/or made by the aforesaid parties;

(iv) Encik Zakaria bin Sharif or any other officer nominated by the plaintiff is hereby authorised to control the conduct of the above-mentioned proceedings, including instructing solicitors;

(v) The defendant and/or its agent, solicitors, auditors, accountants, officer and/or employee shall provide all information and assistance including affirming affidavits and/or statutory declarations and/or witness statements as required for proper conduct of the above-mentioned proceedings;

(vi) The defendant and/or its agent, solicitors, auditors, accountants, officer and/or employees shall disclose all documents including documents in written, printed or electronic form for inspection of the plaintiff or its solicitors or authorised officer, as required for proper conduct of the above-mentioned proceedings;

A (vii) The plaintiff and/or its solicitors or authorised officer shall be entitled to duplicate or make copy of the above-mentioned document and use them in the proceedings commenced and/or brought in the name of the defendant;

B (viii) The defendant shall forthwith indemnify the plaintiff in respect of all costs, expenses, disbursement, tax and/or legal fees incurred for bringing, commencing and/or maintaining the above-mentioned proceedings;

(ix) Parties are at liberty to apply for further directions or orders;
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(x) Such other order, relief or direction as this Honourable Court may deem fit; and

(xi) The cost of and incidental to this application be paid by the
D defendant to the plaintiff.

[2] The grounds for the application are as follows:

(i) The plaintiff is a minority shareholder in the defendant.

E (ii) In the defendants' annual report it was stated that the defendant had placed investment exceeding RM100 million in foreign asset management company. Out of the total investment of RM112,000,000 the defendant had only received RM4,000,000 (the investment sum). However the
F sum of RM108,000,000 is still due and owing.

(iii) The company which owes the investment sum is a company known as Boston Asset Management Pte Ltd.

(iv) The defendant admitted that the sum is due and owing by
G Boston as indicated in its report financial statement ended 30 November 2003.

(v) No steps were taken by the defendant to recover the balance of the investment sum.

H (vi) The plaintiff *vide* its solicitors through a series of letters inquired into the progress of the recovery of the investment sum. The defendant through its solicitors notified that a letter of demand had been issued and a writ of summons may be
I filed against Boston.

(vii) Since there was no update as to the progress of the recovery action the plaintiff then issued a letter pursuant to s. 181B(2) of the CA indicating its intention to commence a derivative action against the defendant.

(viii) On 3 June 2009 the plaintiff filed an OS for leave to commence action against Boston. Through the affidavits it was discovered that:

(a) The defendant had commenced an action against Boston on 28 January 2010.

(b) The said suit was struck out by the High Court as no action was taken by the defendant after the filing of the writ. However the defendant then proceeded to file another suit. The second suit also suffered from the fate as the defendant did not take any further action to file an extension to serve the writ out jurisdiction.

(c) Boston was subsequently wound up on 3 December 2010 by the High Court of the Republic of Singapore. The plaintiff then decided to withdraw the second suit. The defendant however did not file any proof of debt despite request from the plaintiff.

Salient Background Facts

[3] The plaintiff is a registered member of the defendant and holds 6,000,000 units of shares in the defendant representing 10% of its issued and paid up shares capital. The defendant had invested RM112,000,000 million in a foreign asset management company. Out of the total investment of RM112,000,000 the defendant had only received RM4,000,000. An amount of RM108,000,000 was due and owing by the investment company. This is reflected in the notes to the financial statement of the defendant dated 30 April 2001.

[4] Paragraph 18 reads:

> The IMA was opened with a foreign asset management company ("FAMC") with authorization for the FAMC to make discretionary investments in Malaysia. The FAMC acquired 70% equity interest in a property based group ("PBG"). The PBG owns nineteen (19) parcels of development land valued on 28 September, 2001 by a firm of professional valuers to be

A approximately RM400 million. The FAMC has guaranteed, upon notice of withdrawal or termination, to repay the principal amount placed together with the guaranteed return of 5% per annum either *via* the transfer of assets or the proceeds from disposal of the property based investment, under the IMA.

B Subsequent to the financial year end, the FAMC settled the interest accrued as at 30 April, 2003 amounting to RM4,450,000 including interest up to 31 August, 2003 and also partially repaid the placement amounting to RM4,000,000. The balance of the placement amounting to RM108,000,000 with interest thereof will C either be repaid to the Company on or before 30 November, 2003 or as requested by the Company *via* the set off of the amounts payable amounting to RM79,000,000 for the proposed acquisition of the remaining 48% equity interest in SASB. The balance of the placement after the proposed set off amounting to RM29,000,000 with interest thereof will be repaid to the Company on or before D 30 November, 2003.

[5] The notes to the financial statements from 2002-2008 also had explanations clarifications with regards to the said investment. The defendant had demanded the refund of the capital sum E together with interest since December 2005. Until 2008 there is no mention of status of the recovery of the RM108,000,000. In the annual reports the defendant did not mention of any litigation for the recovery of the said sum.

F **[6]** The plaintiff then through its lawyers issued a letter inquiring from the defendant whether legal action had been filed to recover the debt from Boston. The defendant informed the plaintiff that they were studying the matter and will revert after 21 days. The defendant's solicitors subsequently informed the plaintiff that the G defendant had through another solicitors issued a letter of demand against Boston and that there is an intention to file a writ and statement of claim against Boston.

[7] By letters dated 24 June 2008 and 4 September 2008 the plaintiff's solicitors wrote to the defendant's solicitors to inquire H and follow up on the status of the recovery action. They were informed to write directly to the defendant. Therefore by a letter dated 11 September 2008 the plaintiff through its solicitors wrote to defendant to inquire the status of the recovery action. The defendant replied that the defendant's board would reply to the I plaintiff's query. However, the defendant's board failed to so and as a result this plaintiff commenced this action under s. 181A against the directors of the defendant.

The Law

[8] Section 181A of the CA provides:

(1) A complainant may, with the leave of the Court, bring, intervene in or defend an action on behalf of the company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated.

(4) For the purposes of this section and sections 181B and 181E, "complainant" means:

(a) a member of a company, or a person who is entitled to be registered as a member of a company;

(b) a former member of a company if the application relates to circumstances in which the member ceased to be a member;

(c) any director of a company; or

(d) the Registrar, in case of a declared company under Part IX.

[9] Section 181B provides:

(1) An application for leave of the Court under 181A shall be made by originating summons and no appearance need to be entered.

(2) The complainant shall give thirty days notice in writing to the directors of his intention to apply for the leave of Court under.

(3) Where leave has been granted pursuant to an application under 181A, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) In deciding whether or not leave shall be granted the Court shall take into account whether:

(a) the complainant is acting in good faith; and

(b) it appears *prima facie* to be in the best interest of the company that the application for leave be granted.

[10] In deciding whether or not leave should be granted the plaintiff as the complainant must show to the court that the requirements pursuant to s. 181B has been complied:

(a) a 30 days notice in writing has been given to the directors of his intention to apply for the leave of the court;

(b) the complainant is acting in good faith; and

(c) it appears *prima facie* to be in the interest of the company that the application for leave is granted.

[11] Abdull Hamid Embong JCA (as he then was) through his judgment in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808 said explained that:

> The intention of ss. 181A to E of the CA is to enable a member, present or past, to seek leave to bring an action in the name of the company to recover losses sustained by that company. As such, leave to bring a derivative action must not be given lightly (see *Swansson v. R.A. Pratt Properties Pty Ltd & Anor* [2002] NSWSC 583). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. Granting leave is therefore final in that sense and not interlocutory in character. In this respect, the learned judge was wrong in stating cursorily that the matter before him was "only an application for leave" and relying on the low threshold used under O. 53 RHC (application for judicial review) ie, to determine if an application for judicial review is not frivolous or vexations by relying on cases like *Clear Water*. The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s. 181A of the CA are met. A low threshold of merely determining if there existed a *prime facie* case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s. 181A of the CA, and compliance to those statutory requirements. (see *Charlton v. Baber* 21 ACIC 1671).

[12] Gopal Sri Ram JCA (as he then was) in the case of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 said that for leave application the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. All that is required for the applicant to show is that there is some substance in the grounds supporting the application. In the

Supreme Court case of *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627 the court referred to the case of *R v. Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107 where the Court of Appeal in England laid down the guidelines to be followed by the court when considering an application for leave, in the following terms:

> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.
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> (ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
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> (iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further.

Acting In Good Faith

[13] In an application for leave under pursuant to s. 181A of the CA a complainant must show that it is acting in good faith, and that it is *prima facie* in the interests of the company that the action be brought. The complainant must demonstrate that there is a reasonable basis for the complaint and that the proposed action is legitimate and arguable.

[14] The Court of Appeal in the *Celcom* case said that:

> The second crucial requirement for the determination of the court in granting leave is the need for the respondent to show that he was acting in good faith in making this application. (s. 181B(4)(a)). The onus of proof here is on the respondent on a balance of probabilities. The test of good faith is two-fold. One is an honest belief on the part of the respondent, and two, that this application is not brought up for a collateral purpose.

[15] In *Mohd Shuaib Ishak v. Celcom (Malaysia) Bhd* [2008] 1 LNS 314, Ramly Ali J (as he then was) adopted the following principle:

> The test for good faith was dealt with by the Supreme Court of British Columbia in *Primex Investments Ltd v. Northwest Sports Enterprise* [1995] CanLII 717 (BC S.C.), where the Court considered the requirement under section 225 of the B.C. Company Act in an action where the Petitioner applies for leave to bring a derivative action in the name of Northwest Sports Enterprise Ltd against several of its current directors, together with companies in which some of them have an interest. Mr. Justice Tysoe in finding the applicant acted in good faith appears to tie the requirement of "good faith" to the test of the "interest of the company". He stated that were there is an arguable case, the applicant cannot be said to be acting in bad faith because he wants the company to pursue what he genuinely considers to be a valid claim. In that case, there was no evidence the applicant was using the prospect of a derivative action as a threat in order to extract some advantage from the company. Tysoe J. also indicates that an applicant advancing self-interest is not necessarily acting in bad faith.

[16] The learned counsel for the defendant submitted that the plaintiff's application is not premised on acting in good faith. The reasons are as set out below:

(i) There was no full and frank disclosure of the facts by the plaintiff. The plaintiff's representative was a member of the defendant's Board of Directors.

(ii) The plaintiff had never raised any allegations that the directors of the defendant had failed and/or neglected and/or refused to take any action to recover the investment sums. The plaintiff is therefore estopped form raising the objections. (*Re Thien Kon Thai* [2008] 6 MLJ 278).

(iii) The plaintiff had not filed any complaints against the defendant's directors to the Companies Commission of Malaysia or Securities Commission alleging neglect, conspiracy or negligence.

(iv) The investment agreement was entered into with the knowledge and agreement of the Board of Directors. The plaintiff's representative was a member of the board. Therefore

the plaintiff was aware of the said investment as reflected in the defendant's financial reports. Further the plaintiff did not raised any objection neither did it take any steps nor made any complaints despite knowing that the sums may not be fully recovered.

(v) No steps were taken to remove the directors or to vote against the reappointment of any of the directors.

[17] Learned counsel for the plaintiff argued that the plaintiff is not objecting to the investment made. The application is filed because of the defendant's failure and/or refusal of the directors of the defendant to take steps to recover the investment sum due and owing to the defendant by Boston.

[18] It was discovered through the affidavits filed by the defendant that there was a suit filed by the defendant in the Shah Alam High Court (22-537-2007). However no further action was taken and the suit was subsequently struck out by the Shah Alam court. Another suit was filed (22-157-2010) on 4 February 2010. In this suit no action was taken to serve the writ out of jurisdiction during the validity of the writ of summons.

[19] The plaintiff also filed an originating summons (D24-164-2009) on 24 November 2011. In that suit the plaintiff had sought leave to bring an action against Boston to recover the investment sum. However the plaintiff then withdrew the aforesaid suit as by that time Boston had been wound up on 3 December 2010 by the High Court of the Republic of Singapore.

[20] It is further submitted that the breach of the directors' duties were made evident when the directors of the defendant refused to file proof of debt (POD) against Boston when it was wound up on 3 December 2010 by the High Court of the Republic of Singapore. The refused to file the POD was on the basis there is no judgment. The plaintiff subsequently demanded further clarification and/or explanation from the directors of the defendant concerning the failure to pursue the debt. The defendant however did not respond to the plaintiff's request.

[21] It is the submission of learned counsel of the plaintiff that the case of *Re Thien Kon Thai* referred to by the defendant is not applicable as it relates to a fraudulent act of the defendant who had transferred and registered the land in the name of Madam Thien who was not a party to the suit.

[22] The main reason the plaintiff commenced this action is because the defendant had not proceeded diligently to recover the investment sums nor given any reasonable explanation why it had not pursue the recovery of the investment sum. The plaintiff had written to the defendant requesting for an explanation for the failure to pursue the recovery of the investment but the Directors of the defendant have failed to respond or reply to that letter. No explanation has been given by the defendant for the reluctance to file the proof of debt against Boston.

[23] The duties and obligations of the directors are:

(a) To exercise skill, care and diligence in performance and discharge of their duties;

(b) To act honestly and use reasonable diligence in performance and discharge of their duties;

(c) To perform and discharge their duties in the best interest of the Defendant;

(d) To perform and discharge their duties for proper purpose;

(e) Fiduciary duties to the Defendant.

[24] It is the plaintiff's submission that the directors:

(a) Failed and/or neglected and/or refused to recover the returns of 5% per annum on the funds even though Boston has guaranteed the returns since year 2001;

(b) Failed and/or neglected and/or refused to reasonably and diligently proceed with legal action against Boston;

(c) Failed and/or neglected and/or refused to take necessary actions in Shah Alam High Court Suit No. 22-537-2007, resulting it being struck out by the High Court;

(d) Failed and/or neglected and/or refused to take any active steps to apply to serve the Writ of Summons and Statement of Claim in Shah Alam High Court Suit No. 22-157-2010 out of jurisdiction;

(e) Delay in taking recovery steps which deprive the Defendant's earliest opportunity to recover the debt from Boston;

(f) Failed and/or neglected and/or refused to take any action including filing proof of debt with the liquidators of Boston to recover the debt;

(g) The circumstances of this case also provide strong inference that:

(i) The Directors had acted to protect Boston instead of the Defendant;

(ii) The Directors had conspired with Boston by delaying their recovery action until winding up to Boston;

(iii) The Directors had delayed the recovery action with a view to defeat the Defendant's recovery action.

[25] The directors of the defendant must exercise skill, care and diligence in performance and discharge. As the custodian of the defendant the directors are duty bound to explain their actions to the plaintiff. The plaintiff have shown through its affidavits that it is acting in good faith and in the best interest of the company in bringing this action against the defendant. There is no evidence that this application is made in bad faith or for collateral purposes.

Interest Of The Company

[26] Another point that the court must consider deciding whether to grant leave into when is whether "if it appears *prima facie* to be in the best interest of the company that the application for leave be granted."

[27] The test of whether an action is *prima facie* in the interests of the company can be found in the case of *Discovery Enterprises Inc v. Ebco Industries Ltd* [1997] BCTC LEXIS 5338:

> The real question here is whether in the circumstances of this case, 'it is *prima facie* in the interests of the company that the action be brought' (section 222(3)(c)). It will be noted that the Legislature has said that it is sufficient to show that the action sought is *prima facie* in the interest of the company and does not appear to require that the applicants prove a *prima facie* case. Presumably the authors of that legislation had in mind that a minority shareholder being in a real sense on the outside is often not in a position to obtain evidence such as that the Crown could be expected to put forward to found a *prima facie* case in a criminal matter.

[28] In the present case, the complaints by the plaintiff as shown in all the affidavits are not without basis or substance. Even as minority shareholder the plaintiff has the right to take a derivative action to protect the interest of a company.

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Decision Of The Court

[29] Upon reading the originating summons and the relevant affidavits and upon a consideration of the written submissions by counsels for both parties, I held that this was a fit and proper
B case for the court to grant leave to the plaintiff to commence a derivative action in the name of the defendant against the directors of the defendant. The plaintiff has, at this stage, complied with all the procedural requirements as required under ss. 181A and 181B of the CA to obtain leave.

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[30] Based on the above considerations the court grants leave in favour of the plaintiff as in prayer (i) of the application with costs.

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